Reed v. Farmers Insurance Group[*]

I. INTRODUCTION

In the United States today, it is estimated that between five and twenty-five percent of motorists lack any form of automobile insurance coverage.[1] This is true despite the fact that forty-two states, including the District of Columbia, require every individual who registers a motor vehicle to show proof of automobile liability insurance at or beyond a minimal threshold amount.[2] In order to deal with this situation, most states currently require some sort of uninsured motorist (UM) coverage to be offered to purchasers of automobile insurance.[3] Typically, uninsured motorist insurance coverage effectively allows an insured motorist to be compensated for injuries resulting from an automobile accident with individuals who are not insured.[4]

Ever since insurance companies began offering uninsured motorist insurance policies, there has been a tremendous amount of litigation relating to disputes over policy coverage issues and compensation payments made to uninsured motorist policyholders who have been in automobile accidents with noninsured drivers.[5] Many insurance companies have elected to use the

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[*] 720 N.E.2d 1052 (Ill. 1999).

[1] *See* ALAN I. WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 1.12, at 17 (2d ed. 1999). Looking at criteria in specific states, in Texas, for example, it is estimated that nearly 25 percent of drivers are uninsured. However, Illinois, which recently adopted a survey program to crack down on uninsured drivers, has seen its uninsured motorist rate fall from 17 percent in 1988 to 4 percent in 1998. *See* Jim Vertuno, *Senate OK's Surveys to Catch Uninsured Drivers* (visited Apr. 16, 2000) <http://www.caller.com/autoconv/newstexmex99/newstexmex316.html>. Further, due to a newly implemented computer database system, Utah has seen its uninsured motorist rate fall from 322,898 drivers (23 percent) in 1994 to 155,474 drivers (10.4 percent) in 1999. *See* Zack Van Eyck, *Uninsured Drivers' Database Wins Favor: Lawbreakers Drop from 23% to 10% in 4 Years* (visited April 16, 2000) <http://www.insure-rite.com /articles/April24-99.htm>.

[2] *See* ROBERT H. JERRY II, UNDERSTANDING INSURANCE LAW 849 (1996). Typically, these are referred to as "financial responsibility laws." *See id.*

[3] *See id.* at 866 (citing ALAN I. WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 2.1, at 21 (1995)). In fact, 49 states now require UM coverage to be offered, and approximately 17 states mandate by statute that UM insurance be sold with general liability insurance policies. *See id.*

[4] *See* MARGARET C. JASPER, INSURANCE LAW 25 (1998). Normally, although each states' UM provisions vary, most statutory schemes provide for a minimal amount in which an individual is to be compensated for bodily injuries in the unlikely event of an accident with an uninsured motorist. *See* JERRY, *supra* note 2, at 866.

[5] *See* JAMES B. BOSKEY ET AL., THE AMERICAN ARBITRATION ASSOCIATION INSURANCE MANUAL 205 (1993).

alternative dispute resolution (ADR) method of arbitration to resolve disputes arising out of uninsured motorist policies.[6] However, the use of arbitration to resolve disputes arising out of uninsured motorist insurance policies has spawned recently a substantial number of new disputes relating to issues arising out of uninsured motorist arbitration provisions themselves.[7] Paradoxically, arbitration, which normally is used as an alternative "dispute resolution" tool, has turned out, at least in the uninsured motorist arena, to be a large cause of the disputes that actually do arise.

Reed v. Farmers Insurance Group[8] represents a case in which an Illinois state statute that required automobile insurance policies to contain a mandatory arbitration clause was challenged as against public policy and as unconstitutional in violation of an individual's right to due process.[9] The Illinois Supreme Court, in a four to three decision, declared that the arbitration clause was not against public policy and held that the state statute, which authorized such a clause, was not repugnant to the due process clauses of the Illinois or Federal constitution.[10]

II. BACKGROUND, FACTS, AND PROCEDURAL HISTORY OF *REED V. FARMERS INSURANCE GROUP*

On April 1, 1995, the plaintiff, Julie Reed, was injured in an automobile accident when a vehicle that had collided with another vehicle in an intersection hit her car.[11] It was alleged that the driver of the first vehicle,

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[6] *See id.* at 209. The use of the ADR method of arbitration generally is seen as a way to settle disputes more advantageously and efficiently than the traditional judicial process. *See id.* Some common advantages of arbitration over normal court adjudication include the following: (1) arbitration is less expensive and allows for speedier resolution of a case; (2) parties have the ability to select their own decisionmaker, or arbitrator; (3) an arbitration proceeding is typically a "private forum," allowing parties more confidentiality; (4) parties can craft their own rules for the proceeding, making them as informal or simple as they wish; (5) the decision of the arbitrator is generally final and binding, thus bringing closure to a case. *See* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 234 (1999). There does exist the argument, however, that insurance companies have chosen to use arbitration to resolve UM policy disputes primarily for preventing conflicts of interests between themselves and their insureds arising out of liability concerns. *See* BOSKEY ET AL., *supra* note 5, at 209–10.

[7] *See* BOSKEY ET AL., *supra* note 5, at 206

[8] 720 N.E.2d 1052 (Ill. 1999).

[9] *See Illinois Upholds Binding Arbitration Scheme for Uninsured Motorist Coverage Disputes*, U.S. L. WEEK, Nov. 2, 1999, at 1251.

[10] *See id.*

[11] *See Reed*, 720 N.E.2d at 1052.

who fled the scene after the accident, had been an uninsured motorist.[12] Plaintiff had an uninsured motorist insurance policy with the defendant, Farmers Insurance Group, and she sought compensation under her policy coverage for injuries sustained due to the accident.[13] Under Illinois state law, an uninsured motorist insurance policy must contain an arbitration clause to resolve disputes that arise pertaining to coverage and compensation issues.[14] Moreover, according to Illinois law, an arbitrator's award is binding on the parties involved if the amount awarded is below a certain threshold amount,[15] in this case, $20,000.[16] However, if the arbitrator's award were above the minimum threshold amount, then either party would be able to challenge the

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[12] *See id.*

[13] *See id.*

[14] *See id.* With respect to uninsured motorist insurance policies, section 5/143a of the Illinois state insurance law states the following:

> No policy shall be renewed, delivered, or issued for delivery in this State unless it is provided therein that any dispute with respect to the coverage and the amount of damages shall be submitted for arbitration to the American Arbitration Association and be subject to its rules for the conduct of arbitration hearings as to all matters except medical opinions.
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> ....
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> [D]isputes with respect to damages and the coverage shall be determined in the following manner: Upon the insured requesting arbitration, each party to the dispute shall elect an arbitrator and the 2 arbitrators so named shall select a third arbitrator. If such arbitrators are not selected within 45 days from such request, either party may request that the arbitration be submitted to the American Arbitration Association.

215 ILL. COMP. STAT. ANN 5/143a (West 1993 & Supp. 1999).

[15] *See Reed*, 720 N.E.2d at 1055. Section 5/143a of Illinois law states that, "[a]ny decision made by the arbitrators shall be binding for the amount of damages not exceeding the limits for bodily injury or death set forth in Section 7-203 of the Illinois Vehicle Code." 215 ILL. COMP. STAT. ANN 5/143a (West 1993 & Supp. 1999).

[16] *See Reed*, 720 N.E.2d at 2055. With respect to motor vehicle insurance policies, Section 5/7-203 of the Illinois Vehicle Code and the Safety and Family Responsibility Law states that:

> [E]very such policy or bond is subject, if the motor vehicle accident has resulted in bodily injury or death, to a limit, exclusive of interest and costs, of not less than $20,000 because of bodily injury to or death of any one person in any one motor vehicle accident and, subject to said limit for one person, to a limit of not less than $40,00 because of bodily injury or to death of 2 or more persons in one motor vehicle accident....

625 ILL. COMP. STAT. ANN. 5/7-203 (West 1993).

award by going to court.[17] In this case, plaintiff's uninsured motorist insurance policy stated the following:

> If an **insured person** and we do not agree (1) whether the person is legally entitled to recover damages from the owner or operator of an **uninsured motor vehicle**, or (2) as to the amount of payment under this part, either that person or we may demand, in writing, that the issue be determined by arbitration. The amount of the award will be binding unless the amount of the award for **damages** exceeds the minimum required limits set forth in the Illinois Financial Responsibility Law. When we arbitrate, any decision made by any two of the arbitrators in writing shall be binding for the amount of **damages** not exceeding the minimum required limits for **bodily injury** set forth in the Illinois Financial Responsibility Law and may be entered as a judgment in a proper court. When an award exceeds those limits, either party has a right to reject the award and to a trial on all issues in a court of competent jurisdiction. This right must be exercised within sixty (60) days of the award by filing suit in a court of competent jurisdiction. In that event, costs, including attorney fees, are to be paid by the party incurring them.[18]

In the circuit court of Tazewell County, Illinois, Ms. Reed challenged her uninsured motorist insurance policy's arbitration provision, which was required by Illinois statute, as unconstitutional and sought to have the arbitration requirement declared void and unenforceable.[19] Reed initially filed a two-count complaint against the defendant[20] and later filed an amended complaint, alleging five counts.[21] At trial, defendant moved to dismiss both counts of plaintiff's original

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[17] *See Reed*, 720 N.E.2d at 1055.

[18] Reed v. Farmers Insurance Group, 685 N.E.2d 385, 387–88 (Ill. App. Ct. 1997).

[19] *See id.* at 386–87.

[20] Originally, Reed sought to have her insurance policy arbitration clause invalidated and the relevant Illinois statute declared unconstitutional. Second, because of the alleged negligent driving of the uninsured motorist, she sought to recover damages for injuries sustained from the resulting automobile accident. *See Reed*, 685 N.E.2d at 386.

[21] *See Reed*, 720 N.E.2d at 1055. In her appeal to the Illinois Supreme Court, plaintiff alleged the following: (1) the provision in her uninsured motorist coverage that allows parties to appeal an arbitration award in court only if it exceeds a certain amount, but not if it is below another amount, violates public policy and is unenforceable; (2) the arbitration clause in her uninsured motorist policy interferes with a parties' freedom to contract with another, and is unconstitutional; (3) the Illinois statute requiring an arbitration clause in an uninsured motorist policy violates due process and denies parties access to the courts; (4) the arbitration statute violates Article I of the Illinois Constitution, as it takes away a party's right to a jury trial; and (5) the statute violates Article VI of the Illinois Constitution, as it creates a "system of fee officers." *See id.* at 1056–60.

complaint, and the circuit court granted this motion.[22] Plaintiff appealed from this decision, and the Appellate Court of Illinois reversed the decision of the trial court, concluding that the arbitration clause contained in her uninsured motorist coverage was unconscionable and thus unenforceable.[23] Further, the court declared the Illinois state statute, which required a mandatory arbitration clause,[24] to be unconstitutional, as it interfered with plaintiff's right to contract freely.[25] Defendant, Farmers Insurance Group, appealed to the Illinois Supreme Court for review, and its petition was accepted.[26]

III. THE DECISION OF THE SUPREME COURT OF ILLINOIS IN *REED V. FARMERS INSURANCE GROUP*

In *Reed*, the Supreme Court of Illinois reversed the decision of the Illinois appellate court and held that the arbitration provision, both in defendant's insurance policy and as set forth by Illinois state statute, was not against public policy, that it did not violate plaintiff's due process rights, and

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[22] *See Reed*, 685 N.E.2d at 386. The trial court concluded that "there was no constitutional impediment to enforcing the statute, and that the action was not ripe for declaratory judgment." *Id.*

[23] *See id.* at 388–89. The appellate court concluded that "[p]laintiff had no means or opportunity to negotiate the arbitration clause, and was unable to obtain insurance without agreeing to the mandatory arbitration provision. It is this involuntary submission to binding arbitration that we find offensive." *Id.* at 389.

[24] The appellate court found disfavor with this provision and stated that "compulsory arbitration takes away the full flexibility of the parties to choose whether to arbitrate and the way arbitration is structured, and detracts from the stated purpose of the statute." *Id.* at 391.

[25] *See id.* at 390–91. The court, applying the rational basis test, stated that first, it must be determined "whether the statute in question has operated as a substantial impairment of a contractual relationship. If such impairment is found, the proper inquiry is whether the legislative enactment represents a significant and legitimate public purpose, and whether the means are reasonably tailored to promote that purpose." *Id.* at 390. The court first concluded that section 5/143a of the Illinois statute substantially impaired plaintiff's right to bargain, as it forced her to "contract for automobile insurance coverage pursuant to the mandatory coverage laws of the state." *Id.* Second, the court concluded that the provisions of section 5/143a did not represent a proper public purpose that was rationally related to the accomplishment of the legislature's stated goal—"to place the policyholder injured by an uninsured motorist in the same position she would have occupied had the uninsured motorist been minimally insured." *Id.* In acknowledging the statute's purported goal, the court asked, "why 'punish' the insured by mandating binding arbitration and taking away from the insured's right to appeal in cases of no liability or awards below the minimum financial responsibility limits?" *Id.* at 391.

[26] *See Reed*, 720 N.E.2d at 1052.

that it was thus constitutional.[27] In arriving at its decision, the court first addressed plaintiff's primary argument, contained in her first count.

In her first count, Reed alleged that the arbitration clause contained in her uninsured motorist policy, which was mandated by Illinois law, violated public policy and was

therefore unenforceable.[28] At the heart of plaintiff's argument was her claim that the arbitration clause favored the insurance company over the policyholder, as it forced the insured to accept a low award, while it allowed the insurer to unilaterally reject a high award and seek review in a court of law.[29] The Illinois Supreme Court disagreed with plaintiff's contentions for the primary reason that "the arbitration provision that appears in the plaintiff's insurance contract is already an expression of public

policy and represents the legislature's consideration of the question."[30] Here, the court looked specifically to its own precedent to come to this determination.[31]

The plaintiff's second count alleged that the arbitration clause mandated by the state statute interfered with her constitutional freedom to contract because it required that the clause be part of her insurance policy and

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[27] *See id.* at 1058.

[28] *See id.* at 1056.

[29] *See id.*

[30] *Id.* at 1057. In her complaint, plaintiff cited numerous cases that found similar arbitration provisions to have been in violation of public policy. *See id.* (stating that the plaintiff cited the following cases in support of her position: *Mendes v. Automobile Insurance Co.*, 563 A.2d 695 (Conn. 1989); *Worldwide Insurance Group v. Klopp*, 603 A.2d 788 (Del. 1992); *Schmidt v. Midwest Family Mutual Insurance Co.*, 426 N.W.2d 870 (Minn. 1988); *Schaefer v. Allstate Insurance Co.*, 590 N.E.2d 1242 (Ohio 1992); *Pepin v. American Universal Insurance Co.*, 540 A.2d 21 (R.I. 1988)). The Illinois Supreme Court acknowledged these decisions, but distinguished *Reed* from plaintiff's cited cases on the basis that, in those cases, the courts did not deal with any statutory provisions that already had been in place requiring arbitration clauses in uninsured motorist policies. *See Reed*, 720 N.E.2d at 1057. The *Reed* court expressed that "in the present case, in contrast, the legislature has determined that uninsured motorist coverage must contain this provision, and section 143a of the Insurance Code accordingly requires its presence in automobile policies." *Id.*

[31] In *Collins v. Metropolitan Life Insurance Co.*, 83 N.E. 542 (Ill. 1907), the Illinois Supreme Court declared that:

> When the legislature has declared, by law, the public policy of the State, the judicial department must remain silent, and if a modification or change in such policy is desired the law-making department must be applied to, and not the judiciary, whose function is to declare the law but not to make it.

Reed, 720 N.E.2d at 1057 (quoting *Collins*, 83 N.E. at 544).

therefore violated her due process rights.[32] The Illinois Supreme Court, in declaring that "legislation enjoys a strong presumption of constitutionality,"[33] determined that the arbitration provision in question, both of the insurance policy and the statute, was rationally related to a legitimate government interest and therefore did not violate plaintiff's due process rights.[34]

Here, the *Reed* court explained that the main purpose of section 5/143a was to provide an insured driver who had been injured by an uninsured driver at least minimum insurance coverage.[35] Further, the court found that in adopting Section 5/143a, the Illinois legislature could have determined that litigation costs would be lessened and that cases would get resolved in a speedier and more efficient fashion if a mandate was imposed requiring binding arbitration on parties, at least for awards under the $20,000 threshold amount.[36] Certainly, in this situation, the Supreme Court of Illinois felt that the statutory arbitration provision was rationally related to attaining those legislative goals.[37]

With respect to plaintiff's third count, she alleged that the Illinois state insurance arbitration statute violated her due process and denied "her unfettered access to the courts."[38] Again, the Illinois Supreme Court rejected

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[32] *See id.* at 1057–58. The court explained that both the parties and the appellate court were not clear about the correct constitutional right at hand. The court examined the distinction between rights guaranteed under the contract and due process clauses of the federal and Illinois Constitutions. The court did state, however, that the contract clause of the U.S. Constitution (*See* U.S. CONST. art. I, § 10) did not apply here because that provision only prohibits state actions that "impair the obligation of pre-existing contracts." *See Reed*, 720 N.E. 2d at 1058. Here, the court explained, "a statute cannot be said to impair a contract that did not exist when the statute was enacted." *Id.*

[33] *Reed*, 720 N.E. 2d at 1058. The court later determined that the plaintiff did not overcome this strong legislative presumption in her argument. *See id.* at 1059.

[34] *See id.* at 1058–59. The court stated with certainty that "economic legislation satisfies the requirements of due process if it is rationally related to a legitimate government interest." *Id.* at 1058. The court went on to say that in order to determine whether the statute in question impeded plaintiff's freedom to contract, it must be determined whether the arbitration clause "is rationally related to a legitimate government purpose." *Id.* The court further explained that this is the only standard that need be applied. There does not have to be a showing that the method chosen by the legislature "constitutes the best or most efficient means of dealing with the problem at hand." *Id.* at 1058.

[35] *See id.* at 1058 (citing Luechtefeld v. Allstate Ins. Co., 656 N.E.2d 1058 (Ill. 1995); Hoglund v. State Farm Mut. Auto. Ins. Co., 592 N.E.2d 1031 (Ill. 1992)).

[36] *See id.*

[37] *See id.*

[38] *Id.* at 1059.

this argument, and cited a United States Supreme Court case[39] in support of its conclusion that the arbitration statute did not abridge any of plaintiff's constitutional rights. The Illinois Supreme Court found that the narrow range of issues[40] covered by section 5/143a of the state insurance law was nearly identical to that covered under the statute in *Glidden*, and thus, were constitutional in this situation.[41]

In her fourth count, plaintiff asserted that the Illinois state arbitration statute violated her constitutional right to a jury trial as guaranteed by the Illinois State constitution.[42] Looking to its own precedent, the Illinois Supreme Court concluded that in the present case, plaintiff had no protection because the right to a jury trial under the Illinois Constitution "is limited only to actions existing at common law."[43] Here, the court found that under the common law, there did not exist a remedy for plaintiff's current underlying claim (uninsured-motorist coverage).[44] Instead, uninsured motorist insurance

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[39] In its analysis, the Illinois Supreme Court cited *Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co.*, 284 U.S. 151 (1931). *See Reed*, 720 N.E. 2d at 1059 (citing *Glidden*, 284 U.S. at 151). In this case, the Supreme Court of the United States upheld a similar arbitration provision with respect to disputes that arise relating to losses covered under fire insurance policies mandated by Minnesota law. *See Glidden*, 284 U.S. at 163.

[40] The two issues the court alluded to included (a) whether an insured is legally entitled to recover damages from an uninsured motorist and (b) the amount of payment that is due to the insured. *See Reed*, 720 N.E. 2d at 1059.

[41] *See Reed*, 720 N.E.2d at 1059–60. The court explained that the Illinois insurance statute, "which requires arbitration of uninsured-motorist claims and makes arbitral awards below $20,000 binding, does not impinge on a fundamental right or create a suspect or quasi-suspect classification, and therefore it will survive challenge on these grounds if it is rationally related to a legitimate government interest." *Id.* at 1060.

[42] *See id.* In her argument, plaintiff cited *Grace v. Howlett*, 283 N.E.2d 474 (Ill. 1972). In *Grace*, the Illinois Supreme Court determined that a statute requiring the arbitration of automobile injury cases in counties containing under 200,000 people and in other counties for accidents in which claimed losses were under $3,000 violated the right to a jury trial under the Illinois Constitution. *See Reed*, 720 N.E.2d at 1060. The *Reed* court distinguished *Grace* from the one at hand and asserted that "the action at issue in *Grace* represented a common law claim for personal injuries arising from a motor vehicle accident." *Id.* On the other hand, in *Reed*, the court explained that there did not exist at common law a remedy for claims relating to uninsured motorist coverage. *See id.*

[43] *See Reed*, 720 N.E. 2d at 1060. The court stated that "[i]n Illinois, the right to a jury trial does not attach to every action at law. Instead, such right only attaches in those actions where such right existed under the English common law at the time the constitution was adopted." *Id.* (quoting Martin v. Heinold Commodities, Inc., 643 N.E.2d 734 (Ill. 1994)).

[44] *See id.*

was a scheme that was only recently promulgated by the legislature and not by the common law.[45]

In plaintiff's fifth and final count, she argued that the state arbitration statute created "a system of fee officers, in violation of Article VI, section 14, of the Illinois Constitution."[46] Here, the plaintiff cited to the court's decision in *Grace*, which held that a similar arbitration statute violated Article VI, section 14 of the Illinois Constitution.[47] However, the *Reed* court distinguished the *Grace* statute from the one at hand[48] and pronounced that the current arbitration statute did not violate the Illinois Constitution's clause against fee officers in the judicial system.[49]

IV. ANALYSIS: THE ARBITRABILITY OF DISPUTES IN THE UNINSURED MOTORIST ARENA

In Illinois, it is settled, at least for now, that such state-authorized arbitration insurance provisions, as outlined in *Reed*, are permissible and are within constitutional bounds. However, the question that now has to be asked is: Just how *well* settled are such provisions?[50] In *Reed*, the dissent made the argument that in fact, the arbitration provision of section 5/143 of the Illinois insurance statute was not "rationally related to a legitimate government purpose."[51] Further, the dissent argued that a majority of courts[52] have found

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[45] *See id.* The Supreme Court of Illinois asserted that "[t]he state constitutional guarantee of a jury trial was not intended to guarantee trial by jury in special or statutory proceedings unknown to the common law." *Id.*

[46] *Id.* at 1060–61. This provision of the Illinois Constitution states: "There shall be no fee officers in the judicial system." *Id.* at 1061; *see also* ILL. CONST. art. VI, § 14.

[47] *See Reed*, 720 N.E. 2d at 1060–61.

[48] The *Reed* court found that in *Grace*, the statute in question specifically required that in an automobile injury case, an arbitration award "'must be entered by the Court in its record of judgements, and has the effect of a judgment upon the parties unless reversed upon appeal.'" *Id.* at 1061 (quoting *Grace*, 283 N.E.2d at 474). In *Reed*, the court explained, the arbitration statute imposed no such requirement. *See id.*

[49] *See id.* The court maintained that "the form of recovery involved in this case is a special remedy devised by the legislature and is subject to only limited judicial review, and we do not believe that arbitrators handling such claims can be said to become 'fee officers in the judicial system.'" *Id.*

[50] As outlined earlier, the decision of the Illinois Supreme Court was just four to three. *See supra* notes 9–10 and accompanying text.

[51] *Reed*, 720 N.E.2d at 1062 (Bilandic, J., dissenting). The dissent explained that:

> The purpose of section 143a is to provide at least minimum coverage to an insured who has been injured by an uninsured motorist. The arbitration clause is not rationally related to this purpose. Making awards below $20,00 binding on the

that such an arbitration provision that mandates a binding settlement on parties for less than a certain amount but not for a larger amount unfairly favors "insurers to the detriment of their insureds."[53]

As outlined earlier, in coming to its decision, the Illinois Supreme Court in *Reed* relied, in part, on the U.S. Supreme Court's decision in *Hardware Dealers' Mutual Fire Insurance Co. v. Glidden.*[54] In *Glidden*, the Supreme Court of the United States considered whether a Minnesota statute[55] that required an arbitration clause in fire insurance policies for resolving disputes relating to losses infringed on the rights protected by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.[56] In concluding that the Minnesota statute did not impinge on

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> insured has no relation to providing minimum insurance coverage to individuals injured by uninsured motorists.

Id. (Bilandic, J., dissenting). Further, the dissent in *Reed* stated that:

> The majority states that the legislature could have concluded that mandatory binding arbitration for "smaller claims" would help reduce litigation costs and would promote a speedy resolution of cases involving smaller claims. I disagree. As written, the arbitration clause does not eliminate only smaller claims from further litigation. The arbitration clause is not limited to those cases where a plaintiff seeks a smaller award. Rather, it requires arbitration in all cases, and then precludes a trial for a plaintiff who sought a higher award and who may have received an erroneous determination from the arbitrator.

Id. (Bilandic, J., dissenting).

[52] *See, e.g.*, O'Neill v. Berkshire Mut. Ins. Co., 786 F. Supp. 397 (D. Vt. 1992); Mendes v. Auto. Ins. Co., 563 A.2d 695 (Conn. 1989); Worldwide Ins. Group v. Klopp, 603 A.2d 788 (Del. 1992); Hanover Ins. Co. v. Losquadro, 600 N.Y.S.2d 419 (N.Y. Sup. Ct. 1993).

[53] *Reed*, 720 N.E.2d at 1062 (Bilandic, J., dissenting). The dissent referred to the majority opinion of the Delaware Supreme Court:

> Under the present policy language both parties are bound by a low award which an insurance company is unlikely to appeal. While high awards may be appealed by either party, common experience suggests that it is unlikely than an insured would appeal such an award. It is the insurer who, generally, would be dissatisfied with a high award. The policy provision thus presents an 'escape hatch' to the insurer for avoidance of high arbitration awards, whether or not the award was fair and reasonable. However, the insured, who would tend to be dissatisfied with a low award, is barred from appealing such an award, i.e., an award under financial responsibility limits.

Id. (Bilandic, J., dissenting).

[54] 284 U.S. 151 (1931).

[55] The *Reed* court determined that the statute in question in *Glidden* was similar to the one at issue in *Reed. See Reed*, 720 N.E.2d at 1059.

[56] *See id.* (citing *Glidden*, 284 U.S. at 159–60).

the rights guaranteed by the Fourteenth Amendment,[57] the U.S. Supreme Court also asserted that the rights of parties to contract freely with each other are not absolute and may be restricted by reasonable legislative means.[58]

Two other cases to which the *Reed* court cited in its opinion are *Roe v. Amica Mutual Insurance Co.*[59] and *Cohen v. Allstate Insurance Co.*[60] In *Roe*, the Supreme Court of Florida considered a similar insurance arbitration provision to the one that was at issue in *Reed.*[61] Here, pursuant to provisions of the insurance policy, both parties (the insured and the insurer) agreed to arbitrate disputes arising out of claims, with either party being able to unilaterally demand a jury trial if a particular arbitration award exceeded $10,000.[62] However, in this situation, the state statute at issue did not mandate arbitration, as was the case in *Reed.* Instead, the parties here (insurer

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[57] The U. S. Supreme Court announced:

> Granted, as we hold now, that the state, in the present circumstances, has power to prescribe a summary method of ascertaining the amount of loss, the requirements of the Fourteenth Amendment, so far as now invoked, are satisfied if the substitute remedy is substantial and sufficient. We cannot say that the determination by arbitrators, chosen as provided by the present statute, of the single issue of the amount of loss under a fire insurance policy, reserving all other issues for trial in court, does not afford such a remedy, or that in this respect it falls short of due process, more than the provisions of state workman's compensation laws for establishing the amount of compensation by a commission, or the appraisal by a commissioner of the value of property taken or destroyed by the public, made controlling by condemnation statutes, or findings of facts by boards or commissions which, by various statutes, are made conclusive upon the courts, if supported by evidence.

Glidden, 284 U.S. at 159–60.

[58] The U.S. Supreme Court explained:

> The right to make contracts embraced in the concept of liberty guaranteed by the Fourteenth Amendment is not unlimited. Liberty implies only freedom from arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. Hence, legislation otherwise within the scope of acknowledged state power, not unreasonably or arbitrarily exercised, cannot be condemned because it curtails the power of the individual to contract.

Id. at 157–58.

[59] 533 So. 2d 279 (Fla. 1988).

[60] 555 A.2d 21 (N.J. Super. Ct. App. Div. 1989).

[61] *See Roe*, 533 So. 2d at 280. In part, the insurance provision stated that "[i]f we and a covered person do not agree [w]hether that person is legally entitled to recover damages under this Part; or [] [a]s to the amount of damages; either party may make a written demand for arbitration." *Id.* (alterations in original).

[62] *See id.* Thus, both parties agreed to binding arbitration for an award up to $10,000 and to nonbinding arbitration for awards over $10,000. In this case, the arbitrators awarded the insured $225,735, and the insurer sought relief in court. *See id.* at 280–81.

and insured) were given the opportunity either to accept or reject the provisions of the Florida Arbitration Code in deciding whether or not to adopt an agreement to arbitrate disputes.[63] In asserting that "arbitration is a desirable option and should be encouraged,"[64] the Florida Supreme Court in *Roe* concluded that because both parties had initially agreed to the "escape clause"[65] provision of the policy, there existed no violation of public policy inherent in the enforcement of the arbitration clause of the insurance policy.[66]

In *Cohen*, the plaintiff brought an action to have an uninsured motorist arbitration provision invalidated.[67] Again, similar to *Reed*, this provision allowed either party to "demand the right to a trial"[68] if the arbitration award had exceeded "the minimum limit for liability specified by the financial responsibility law of New Jersey."[69] In *Cohen*, the plaintiff argued that the provision allowing one party to "escape" from an arbitration award violated both New Jersey statutory law[70] and public policy.[71] The Appellate Division of the New Jersey Superior Court, rejected these contentions. It concluded that the uninsured motorist arbitration provision originally was agreed to by both parties, and that each party had the right to "stand upon the precise terms of their contract,"[72] without a court intervening to rewrite the contract

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[63] *See id.* at 281. Florida law provides that arbitration agreements "shall be valid, enforceable, and irrevocable without regard to the justiciable character of the controversy; provided that this act shall not apply to any such agreement or provision to arbitrate in which it is stipulated that this law shall not apply or to any arbitration or award thereunder." *Id.* (quoting FLA. STAT. ANN. § 682.02 (West 1990 & Supp. 2000)).

[64] *Id.*

[65] Typically, provisions in insurance policies, such as this one, in which one party can unilaterally "reject" a particular arbitration award and seek relief in a court of law, are referred to as "escape clauses." *See id.*

[66] *See id.* Here, the court emphasized that both parties equally had the same opportunity to reject an arbitration award that was over $10,000. In other words, the insured would have had the same opportunity as the insurer to reject an award that he found unsatisfactory, even if it was slightly over $10,000. *See id.*

[67] *See* Cohen v. Allstate Ins. Co., 555 A.2d 21, 22 (N.J. Super. Ct. App. Div. 1989).

[68] *Id.*

[69] *Id.* Here, the limit was $15,000 per person and $30,000 per accident. *See id.*

[70] The plaintiff pointed to New Jersey law, which specifically sets the parameters for the only situations in which a court may vacate an arbitration award. *See id.* at 22–23; *see also* N.J. STAT. ANN. § 2A:24-8 (West 1987). In response to this, the court noted that, "[e]nforcement of the policy provision does not involve judicial vacation of the arbitration award; rather, it effectuates the presumed common intent of the parties that, in certain circumstances, the award is to be of limited effect." *Cohen*, 555 A.2d at 22.

[71] *See Cohen*, 555 A.2d at 22. The plaintiff argued that Allstate, the defendant insurance company here, unconscionably benefited from this type of policy, which represented a "contract of adhesion." *See id.* at 23.

[72] *Id.* at 23.

or amend the policy's scope of arbitration.[73] Further, the court found that there existed no concrete evidence in this case that showed that the uninsured motorist policy unfairly advantaged the insurer to the detriment of the insured.[74]

Schaefer v. Allstate Insurance Co.[75] represents yet another case in which an uninsured motorist policyholder brought an action to challenge the policy's arbitration provision.[76] In *Schaefer*, the Supreme Court of Ohio was called upon to determine whether an uninsured motorist policy was unconscionable and against public policy because it mandated binding arbitration for parties on awards below a certain limit but allowed for nonbinding arbitration in situations in which an award exceeded that limit.[77] Before getting to this question, the Ohio Supreme Court first grappled with the definition of "arbitration" and concluded that in Ohio, "arbitration is intended to be an alternative method of dispute resolution which is final (and must be accorded finality) in all circumstances except those specifically set forth in the statute."[78]

In resolving the arbitration provision's allowance of both binding and nonbinding arbitration the *Schaefer* court concluded that, depending on the award of the arbitrator, the provisions of the uninsured motorist arbitration

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[73] *See id.* The court stated that "the ascertainable public policy here is to encourage resort to arbitration while preserving full flexibility to the parties to elect or reject, and to structure and limit, that process as they choose. The Allstate provision does not conflict with that policy." *Id.*

[74] *See id.* at 24. The court asserted that "[w]e cannot properly base a determination of unconscionability on unsubstantiated impressions and personal intuition." *Id.*

[75] 63 Ohio St. 3d 708 (Ohio 1992).

[76] *See id.* at 709–10.

[77] *See id.* The policy in question in *Schaefer* was essentially the same as the one that was at issue in *Reed*. Here, Ohio's financial responsibility law (requiring coverage of at least $12,000 per person and $25,000 per accident) set the threshold limits between the points at which binding and nonbinding arbitration would occur. *See id.* According to the policy in question in *Schaefer*, if an arbitrator's award exceeded those limits, either party could demand a trial de novo in a court of law. *See id.* at 716.

[78] *Id.* at 714 (citing OHIO REV. CODE ANN. § 2711.01 (West 1994)). The court determined that the intention of the legislature was to give arbitration a "final and binding effect." *See id.* The *Schaefer* court explained:

> In R.C. Chapter 2711, the General Assembly has not only provided that agreements to settle a controversy by arbitration are valid, irrevocable, and enforceable, but that a court may, upon motion, confirm an arbitrator's award and, thus, reduce the award to judgment. Additionally, the General Assembly has provided that an arbitrator's award may, upon motion, be modified, corrected, or vacated only under certain conditions, which conditions represent the rarest of circumstances.

Id.

policy were unenforceable, as they conflicted directly with Ohio law.[79] Here, the Supreme Court of Ohio felt that such an "escape hatch" that effectively allowed one party to unilaterally "walk away" from an arbitrator's determination defeated the intention of the legislature—to have arbitration be final and binding, except in rare delineated circumstances,[80] which did not apply to this situation.[81]

As in *Reed*, while it is true that some states have adopted statutes that specifically mandate or approve of arbitration provisions contained in uninsured motorist policies,[82] several states also have promulgated statutes restricting the use of arbitration in such uninsured motorist policies.[83] In some states, arbitration provisions are prohibited outright,[84] in others, they

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[79] *See supra* note 78 and accompanying text. In fact, the *Schaefer* court never quite reached plaintiff's assertion that the uninsured motorist arbitration provision was unconscionable. *See* John P. Maxwell, *A Quantum Leap Backwards: The Ohio Supreme Court Constricts the Definition of "Arbitration" in* Schaefer v. Allstate Insurance Company, 9 OHIO ST. J. ON DISP. RESOL. 181, 182 (1993). Instead, the Ohio Supreme Court took a "stab" at nonbinding arbitration, and disclaimed its existence as a legitimate form of dispute resolution in the state of Ohio. *See id.* It is argued that the *Schaefer* court "redefined the term 'arbitration' in such a limited way that the opinion will undoubtedly have a chilling effect on the implementation of effective methods of alternative dispute resolution in Ohio." *Id.* at 181.

[80] In general, a court can vacate an arbitrator's otherwise binding decision if it is determined that an award is "procured by corruption, fraud, or undue means," if there is evidence that an arbitrator's partiality or misconduct prejudiced a party, or if an arbitrator exceeded her power in a particular situation. *See* OHIO REV. CODE ANN. § 2711.10 (West 1994).

[81] The *Schaefer* court expressed that:

> [I]t is apparent that the insurance provision in question here represents a clear attempt to bypass R.C. Chapter 2711 by setting up an "escape hatch" for any party disappointed with an award exceeding a specified amount. In doing so, the provision completely frustrates the purposes of "arbitration" and every public policy reason favoring the arbitration system of dispute resolution. By permitting a trial de novo in some instances, the provision unnecessarily subjects the parties to multiple proceedings in a variety of forms, increases costs, extends the time consumed in ultimately resolving a dispute, and eviscerates any advantage of unburdening crowded court dockets. Accordingly, since the provision is not a provision for true arbitration, the entire agreement to "arbitrate" clause is unenforceable.

Schaefer, 63 Ohio St. 3d at 716.

[82] *See* WIDISS, *supra* note 1, § 23.12, at 242–44. Examples of these states include California, Connecticut, Illinois, and Oregon. *See id.*

[83] *See id.* § 23.4, at 216–19.

[84] For example, in Tennessee it is stated that, "the uninsured motorist provision shall not require arbitration of any claim arising hereunder . . . ." *Id.* at 218. Likewise, in West Virginia, it is stated that, "[n]o such (uninsured motorist) endorsement or provisions shall

are optional,[85] and in some states, arbitration provisions are contingent on the insured party being able to request a review by a court if they are not satisfied with the outcome of the arbitration.[86]

In some situations, the enforceability of arbitration provisions in uninsured motorist policies can be affected by its characterization as a "contract of adhesion."[87] For example, in *Cohen*, the plaintiff unsuccessfully argued that the insurance company unconscionably benefited from the arbitration provisions of the uninsured motorist policy, which represented a contract of adhesion.[88] With respect to contracts of adhesion, some state statutory schemes that approve of the use of arbitration, provided for in written contracts to resolve disputes, state that the arbitration is "valid, enforceable and irrevocable"[89] unless the provision is a contract of adhesion.[90] While some take the view that uninsured motorist coverage that is characterized as "adhesive" should not have an effect on the enforceability of arbitration provisions,[91] the argument can be made that such adhesion contracts have fundamentally detrimental effects on the insured to the benefit of the insurer.[92]

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contain any provision requiring arbitration of any claim arising under any such endorsement or provisions . . . ." *Id.*

[85] In Kansas it is established that "[t]he insured *shall not be required to arbitrate* disputed claims except as to determination of amount of loss." *Id.* at 216 (emphasis added). Further, in Louisiana, it is stated that:

> The coverage . . . may include provisions for the submission of claims by the insured to arbitration; provided, however, that the submission to arbitration shall be optional with the assured, shall not deprive the assured of his right to bring action against the insurer to recover any sums to him under the terms of the policy, and shall not purport to deprive the courts of the state of jurisdiction of actions against the insurer.

Id. at 217.

[86] *See id.* at 216. Such is the case in Nevada, where it is stated that "[n]o provision for arbitration contained in an automobile liability or motor vehicle liability insurance policy delivered, issued for delivery or renewed in this state after the effective date of this act is binding upon the named insured or any other claiming under the policy." *Id.* at 217. Similarly, in Arkansas, it is established that, "[n]o insurance policy . . . shall contain any condition, provision or agreement which directly or indirectly deprive the insured . . . of the right to trial by jury or any question of fact arising under such policy . . .; (b) all such provisions . . .shall be void." *Id.* at 218.

[87] *See id.* § 23.7, at 228.

[88] *See supra* note 71.

[89] *See, e.g.*, 42 PA. CONS. STAT. ANN. § 7303 (West 1998).

[90] *See* WIDISS, *supra* note 1, § 23.7, at 231.

[91] *See id.* at 230.

[92] *See id.* at 229. Typically, arbitration provisions in insurance contracts are contained in very complicated and lengthy documents, which the policyholder may not get to review until several days or weeks after the insurance policy has already been

As can be seen by this split of jurisdictions on the use and feasibility of arbitration with respect to uninsured motorist policies, there is currently no definitive answer on this issue, with each situation being evaluated on a case-by-case basis in each respective state. It is the author's contention that the use of arbitration to resolve disputes that arise in the uninsured motorist context is highly beneficial to both parties.[93] However, the author does find disfavor with certain arbitration provisions such as the one at issue in *Reed* that allow one party unilaterally to use an "escape hatch" to reject a high award and seek review in a court of law, but that binds both parties to a lower award. In the majority of cases, the one appealing a high award will be most likely the insurer rather than the insured.[94] Thus, such an escape clause provision acts unfairly to advantage the insurer to the detriment of the insured.

It is the author's belief that pursuant to statute, arbitration provisions contained in uninsured motorist policies should state that arbitration awards will be binding only on the insurer, with the insured party being able either to accept the award or to be allowed to seek review of the award in a court of law. This setup, which, as outlined above, has been approved for use in some states, would help to alleviate the effects of the adhesive nature of an uninsured motorist policy and would bring the policyholder onto a more even playing ground in his dealings with a particular insurance company.

V. CONCLUSION

Arbitration is certainly considered a respected form of alternative dispute resolution in many jurisdictions throughout the United States.[95] In the uninsured motorist arena, the use of arbitration is generally a very popular mechanism among states, courts, and insurance companies for resolving

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purchased. *See id.* In *Popskyj v. Keystone Insurance Company*, 565 A.2d 1184, 1197 (Pa. Super. Ct. 1989) (Del Sole, J., dissenting), it was stated that "[s]ince it has been recognized that insurance contracts are typically contracts of "adhesion," there is no question that Appellant was not in a position to make a "meaningful choice" whether he should accept this arbitration provision." *Id.*

[93] In general, compared to traditional forms of litigation, arbitration allows for a quick determination of disputes, it is less expensive in resolving disputes (no attorney's fees or overhead costs), it tends to provide more stable awards, and it alleviates court congestion. *See generally* Recent Case, 78 HARV. L. REV 1250 (1964).

[94] *See supra* note 53 and accompanying text.

[95] As was so eloquently stated in *Mayflower Insurance Co. v. Pellegrino*, 212 Cal. App. 3d 1326, 1334 (Cal. Ct. App. 1989): "There is a strong public policy favoring arbitration as an expeditious and economical means of dispute resolution." *Id.*

disputes pertaining to coverage and compensation issues.[96] However, the future of arbitration provisions in uninsured motorist policies that provide for an "escape hatch," allowing one party unilaterally to seek review of an arbitration award, is currently uncertain. In *Reed*, this form of nonbinding arbitration was approved for use by the Supreme Court of Illinois, which determined that such a use did not violate public policy or impinge on any constitutional rights. However, some courts have called into question this hybrid use of arbitration, as was the case in *Schaefer*.

Once again, although the law on this matter may be quite settled in the state of Illinois and in other jurisdictions which have been confronted with determining what the proper use of arbitration is in the uninsured motorist context, if any, there exists no clear uniform standard that controls in a given situation. Until the United States Supreme Court takes on this issue,[97] if ever, we may just have to live with the varying standards that currently exist in jurisdictions throughout the United States on this very complex and controversial issue.

Mark Arthur Saltzman

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[96] In the uninsured motorist context, for example, "the insured usually can obtain an arbitration hearing date much earlier than a court date. In addition to being speedier, arbitration is usually more cost-efficient and informal. Experience indicated that insureds, as a whole, may do better, in terms of net recovery, in arbitration than in court." William A. Mayhew, *Bad Faith and the Uninsured Motorist Claim*, 19 FORUM 618, 618 (1984).

[97] Of course, issues pertaining to automobile insurance in the United States primarily are considered traditional state concerns, but the U.S. Supreme Court certainly would have the final say on such issues from a federal constitutional perspective.